United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-1499

B.
P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

NICHOLAS DEMETROULES and NMD FILM DISTRIBUTING CO., INC.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

KASSNER & DETSKY, P.C.
Attorneys for Appellants
122 East 42nd Street
New York, New York 10017

TABLE OF CONTENTS

TABLE OF CASES

PRELIMINARY STATEMENT

Nicholas Demetroules and NMD Film Distributing Co., Inc. appeal from judgments entered in the United States District Court for the Western District of New York (Curtin, J.) on October 12, 1976, convicting them of using a common cafrier to transport in interstate commerce an obscene motion picture film, in violation of Section 1462 of Title 18, United States Code.

The indictment in one count charged both defendants with on or about December 5, 1973 using the Greyhound Bus Company, a common carrier, for carriage in interstate commerce from the State of New Jersey to the State of New York an obscene motion picture film entitled "The Healers".

After a short trial before Judge Curtin, the jury found the defendants guilty. The district court thereafterafter denied the defendants' motion for a judgment of acquittal and for a new trial. Thereafter the district court fined Nicholas Demetroules $2,000.00 and NMD Film Distributing Company, Inc. $2,000.

STATEMENT OF FACTS

Government's Case

On December 4, 1973, two film canisters were received by the Greyhound Bus Company and its terminal in New York City for shipment to Buffalo, New York. As set forth on the bus bill the shipper of the film canisters was General Delivery Service, 399 West 45th Street, New York, New York. The consignee of the canisters was Clark Distributing, 108 Gruner Road, Buffalo, New York. The canisters themselves were addressed to NMD Film, care of Clark's Services, 108 Gruner Road, Buffalo, New York.

On December 5, 1973, one of the canisters arrived at the Greyhound Bus Terminal in Buffalo, New York at approximately 1:00 p.m. It was immediately initialed by Special Agent Skinner of the Federal Bureau of Investigation. At approximately 4:30 p.m. the same day the second canister arrived and Agent Skinner placed his initials and date on it.

Later that afternoon Joseph Heckt a motion picture projectionist working at the Back Stage Theatre in Buffalo went to the Greyhound Bus Terminal and picked up the two canisters. Upon returning to the theatre he opened the

canisters and removed the reels of film which were marked "The Healers".

Thereafter the exhibition of the film commenced and it was shown daily until December 11, 1973, when it was seized pursuant to a search warrant by Special Agent Danial Shaffer of the Federal Bureau of Investigations.

The film was exhibited to the jury and after its exhibition to government rested.

Defendants' Case

After motions for a judgment of acquittal had been denied the defense called two expert witnesses who testified that in their opinion the film did not appeal to the purient interest of the average person in the community; was not patently offensive and had serious literary and artistic value.

ISSUES PRESENTED

1. Is the motion picture film "The Healers" obscene where it does not appeal to a prurient interest in sex; does not contain hard-core sexually explicit material, and has serious value?

2. Was there sufficient evidence from which the jury could find that either or both defendants used the Greyhound Bus Company to transport the film "The Healers" in interstate commerce ?

ARGUMENT

POINT I

THE FILM KNOWN AS "THE HEALERS", IS IN NO WAY OBSCENE UNDER STANDARDS ENUNCIATED BY THE ROTH-MEMOIRS TEST OR THE TEST MILLER v. CALIFORNIA

(1)

The film, "The Healers", is in no way a film that can be considered a picture whose focus or whose thrust is to appeal to a purient interest in sex. Upon a review of the film by any logical thinking person, it is obvious that the intent of the producer and director was to create a farce, ridiculing, and in effect, a put-down on films that seek to promote sex and sex acts in the film business. Moreover, it attempts to ridicule and hold up to a most searching and ludicrous light the professions of psychologists and psychotherapists who now make a fetish of the cures that can be effected in sex clinics and it indicates that sex clinics are stupid, wholly ineffectual, and a rip-off so far as the average man is concerned. As if the film itself did not do more than emphasize the foregoing, the producer went further and at the conclusion of the film went to great lengths to introduce the stars of the film in a very funny and ludicrous manner so as to make the public viewers of the film recognize

that they were viewing nothing else but a farce and a put-down of the many people who profess to the seriousness of the type of film that portrayed sex for sex sake only. It is obvious that it was the intent of the producer, editor and director to make this film a farcical treatment of sexoligsts and psychologists who pretend that sexual treatments and sexual contact is the be all and end all of a person's problems.

There can be no way in which the film can be deemed to be in any way an appeal to a purient interest in sex.

(2)

Whether one applies the Roth-Memoirs test or the test set forth in Miller v. California, the fact remains that there is no patently offensive hard core portrayal in this film.

There is nothing that can be deemed patently offensive because it affronts contemporary community standards relating to the description and representation of sexual matters. There is nothing that is portrayed in a patently offensive way. There is nothing which is hard core. The producers, directors and editors took great pain to avoid showing any type of situation that could be remotely deemed

as hard core in any shape, form or manner. What may have existed may have raised some suggestiveness of one sort or another, but it was done in fun, was not done seriously, was not intended to portray sex for sex sake and was not intended in any way to demonstrate lewdness for the sake of commercial gain or just for the sake of exhibiting lewd genitalia to appeal to a public whose tastes would be whetted by such film.

In Jenkins v. Georgia, 418 US 153, 41 L. Ed. 2d 642 94 Sct 2750, (June 1974), the Court reiterated that in Miller v. California it intended to limit a definition of obscenity to patently offensive hard core sexual conduct. Said the Court at page 650, 41 L.Ed. 2d:

* * *

> Not only did we there say that the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constituional claims when necessary 413 U.S. at 25, 37 L.Ed.2d 419, but we made it plain that under that holding, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive hard core sexual conduct....' (citation omitted)
>
> We also took pains in Miller to give a few plain examples of what a state statute could define

for regulation under part (b) of the standard announced, that is, the requirement of patent offensiveness, Id., 25, 37 L.Ed. 2d 419. These examples included 'representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated' and 'representations or descriptions of masturbation, excretory functions and lewd exhibition of the genitals' Ibid. While this did not purport to be an exhaustive catalog of what juries might find patently offensive, it was certainly intended to fix substantive constitutional limitations deriving from the First Amendment, on the type of material subject to such a determination. It would be wholly at odds with this aspect of Miller to uphold an obscenity conviction based upon a defendant's depiction of a woman with a bare midriff, even unanimously agreed on a verdict of guilty.

Our own viewing of the film satisfies us that 'Carnal Knowledge' could not be found under the Miller standards to depict sexual conduct in a patently offensive way. Nothing in the movie falls within either of the two examples given in Miller of material which may constiutionally be found to meet the 'patently offensive' element of those standards, nor is there anything sufficiently similar to such material to justify similar treatment. While the subject matter of the picture is, in a broader sense, sex, and there are scenes in which sexual conduct include 'ultimate sexual acts' is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition of the actors' genitals, lewd or otherwise during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the Miller standards."

In the Miller case, there was no actual overruling of the Roth case, but a redefinition and a more precise refinement of the standards required to exist before any court could pass judgment on whether a film could be considered obscene. The Supreme Court did not by virtue of the Miller decision overrule previous cases that had followed the Roth-Memoirs test or that sought to apply the Roth-Memoirs test. Hence, some of the decisions prior to Miller can serve as guidelines of what was considered or what should be considered as obscene.

For example, the United States Supreme Court did not overrule Kois v. Wisconsin, 408 U.S. 229 33 L.Ed.2d 312, (1972), but even referred favorably to that case.

In the Miller decision, the United States Supreme Court was struggling to more clearly define what was meant by the term obscenity so that jurors and judges would know that simulated pictures could not be placed in the same category as hard core films, that there was a great degree of difference between the two and that it was perhaps wrong for the courts below to mix the two together.

A general statement of the law respecting obscenity and the manner in which it should be applied, was very carefully set forth in the case of United States v. Thirty Five MM Motion Picture Film Entitled, "Language Of Love", 432 F.2d 705 (CA2 1970). There this court set forth the criteria by which

obscenity must be measured. In the aforesaid case of United States v. 35 MM Motion Pitcture Film entitled, "Language of Love" decision, Judge Moore analyzed very carefully, very logically and very reasonably what the courts meant by the tripartite tests refined and which we now know as the Roth-Memoirs test, in determining that the film involved in that case was not obscene.

It is interesting to observe what Judge Moore had to say about purient interest. At page 711, the Court stated as follows:

> "In Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304 (1957) Mr. Justice Brennan stated for at least five members of the Court the rather clear proposition that 'sex and obscenity are not synonymous' 345 U.S. at page 487,77 S.Ct. 1310.
>
> Abandoning the clarity of that simple negative declaration, he shifted to the affirmative:
>
> "Obscene material is material which deals with sex in a manner appealing to purient interests".
>
> Clues to the character of a "purient interest" as opposed to a mere sexual interest were included in the accompanying footnote seeking to explain the scope of the term of art which was to become a fixed and immutable requisite for a finding of obscenity. The definitional terms were words such as "lustful", "itching", "morbid

> or "lascivious", and "lewd", all of which connote a sense of debasement of sub-normal furtiveness or guilt. The clearest statement excluding normal sexual desire or libidinal arousal was the substitute for "purient interest" offered by the drafters of the American Law Institue Model Penal Code (Tentative draft No. 6, 1957), quoted with apparent approval in the footnote the Model Code characterized an obscene thing as one whose "predominant appeal" is to be a purient interest for example a shameful or morbid interest in nudity, sex or excretion---" Id. 487, Note 20 77 S.CT 1310.
>
> To our knowledge, nothing that the Supreme Court has said subsequent to Roth would alter the restrictive definition of "purient interest' contained in that footnote. We conclude, therefore, that the Supreme Court has never intended to brand as "obscene" representations of sexual matters which do not import a debasing, "shameful or morbid" quality into the expression or depiction of human sexuality. To conclude otherwise would be to suggest that the human body and its functions are in themselves somehow "dirty" or unspeakably offensive. There is no logic in such a position and we reject it."

Continuing at page 712 of 432 F. 2d 705, Judge Moore continued as follows:

> The erotic instinct and the apparent desire for sex education are in the ascendency in our society and in the sensitive area of constitutional adjudication of individual rights we must be careful to distinguish between the arousal of sexual instincts and the perversion of those instincts to morbidity. That we believe is essential to the wisdom of the Supreme Court's attempts to keep the door barring Federal and

> State intrusion into (the area of first amendment freedoms) tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests as long as government chooses to remain in the distasteful business of censorship. Roth, supra, 354 U.S. at 488, 77 S.Ct. 1311. Since presentation of the sexual matter in this film is not characterized by the forbidden "leer of the sensualist", Ginzburg v. United States, 383 U.S. 463, 468, 86 S.Ct. 942, 16 L.Ed. 2d 31 (1966), we do not believe the film as a whole can be considered as an appeal to purient interest.

The United States Supreme Court in the Miller decision never for a moment departed from the purient interest test and from the need to prove as a constiuttional fact that the dominant theme of the film under review appealed to such purient interest in sex. Where such is not the dominant theme of the film, there can be no finding of obscenity.

(3)

With respect to community standards, the fact remains that in the State of New York we refer to a state standard for determining what is or what is not community standards. Clearly, in the case of a film such as "The Healers" which apparently has been shown elsewhere in the State of New York without any difficulties of any kind, and which film has never been

prosecuted by any of the local authorities, and which film has been shown in colleges and in other places of education without interference by any local official or by any local dean of any kind, clearly in such instance, there has been indicated on a statewide basis, that the film is not offensive, does not go beyond customary limits of candor so far as the Statewide community is concerned.

Upon the issue of community, there is certainly a clear dispute in the court system as to what shall be and what shall not be deemed the community. Certainly with respect to a case in the federal courts, we still submit that the national standard should be the one used. However, in view of previous decisions by the United States Supreme Court, we submit that where a state court has indicated that the state community controls, so far as defining what is or is not obscene, then clearly it is the duty of the federal court to instruct any jurors that they must judge a film by state wide standards and not simply local community standards.

Where a film such as "The Healers", has been shown throughout the state without interference by any local authority, without there once having been difficulties with the said film, I think it is important that this be shown to the jurors so that they may recognize that the first and only time that there has been called to the attention of anyone having anything to do with the film that the film is obscene is when this

indictment was handed down. I believe it is indeed significant that the picture has never been impuned, or charged with obscenity anywhere in the State of New York or for that matter anywhere throughout the United States where it has ever been shown or exhibited.

In Hamling v. United States, supra, the Supreme Court referred with some degree of favor to Manual Enterprises v. Day, 370 U.S. 478 L.Ed. 2d 639, 82 S.Ct. 1432 decided in 1962 where Justice Harlan in determining the language of 18 USC, Section 1461 with respect to what is considered to be obscene, indicated quite clearly, that it meant portrayal in a lewd, lascivious, indecent, filthy or vile manner, that it was an obnoxious debasement of portrayals of sex, and that it was fundamentally indecent and wholly debasing.

This is the manner in which Justice Harlan tried to define the words purient interest and to indicate what would exceed aceptable limits of candor in the community. We submit that the Miller case does not go further than that. When the Miller decision refers to hard core portrayals of sex, it is lending great emphasis to the words purient interest, more so than in any prior decision that had been rendered previous to the Miller case.

> When the Miller case referred to a film lacking in literary, artistic, political or scientific value, an idea of any kind or nature. When a

> film contains ideas of any kind of nature, set forth in a story line in the film, it cannot be deemed to be lacking in literary artistic, political or scientific value.
>
> A film that attacks the put-ons and rip-offs of sex clinics such as "The Healers", and that attack and challenges the rip-offs and put-ons of psychologists with respect to their history and philosopy about sex, but a picture that seeks to uphold the meaningfulness of sex between the parties.

The very film, "The Healers" is the antithesis on any other motion picture that the courts have found to be in any way obscene or unworthy of protection of First Amendment freedoms.

POINT II

THERE WAS NO EVIDENCE EITHER OR BOTH OF THE DEFENDANTS USED THE GREYHOUND BUS COMPANY TO TRANSPORT THE FILM FROM NEW YORK CITY TO BUFFALO.

The indictment in this case has charged the defendants with on or about December 5, 1973, knowingly using the Grehound Bus Company to transport an obscene motion-picture film "The Healers" from New Jersey to New York. As part of its case the government was required to prove that the defendants actually did ship the film by the Greyhound Bus Company. The only evidence presented by the government concerning the shipment of the film was a bus bill (Government Exhibit "1") and the film containers themselves (Government Exhibits "3" and "4").

The bus bill showed that the shipment was received by the Package Express Department of Greyhound on December 4, 1973 at 4:09 pm. The shipper was listed as General Delivery Service, 399 West 45th Street, New York, New York, and the consignee was listed as Clark Distributing, 108 Gruner Road (50). One film container (Government Exhibit "3") had NMD Film C/O Clark Services, 108 Gruner Road, Buffalo, New York, written on it. No other evidence was presented by the government directly related to the shipment of the film. Since this

evidence was clearly not sufficient to prove that the defendants were involved with the shipment or carriage of the film the government introduced several advertisements and promotional material (Government Exhibits "10" through "14"). These exhibits stated that Nicholas Demetroules presented the film and that it was released by NMD Film Distributing Company.

In analzying evidence to determine its sufficiency this court must consider whether there is any evidence upon which a reasonable mind might fairly conclude the defendant s guilt beyond a reasonable doubt. If there is no such evidence then a motion to acquit must be granted. United States v. Taylor, 464 F.2d 240 (CA2 1972). In applying this test to the evidence it is clear that it was not sufficient to prove that the defendants shipped the film or utilized the services of the Greyhound Bus Company. The bus bill is no evidence that defendants shipped the film but on the contrary it is evidence that they did not because General Delivery Service is listed on the bill has the shipper. Moreover the writing on the film container does not assist the government because it does not involve the defendants in the shipment or carriage of the film. On the contrary it indicates that the defendant was simply the recipient who could have no control over the manner in which the film was shipped or the person who shipped it.

Probably realizing that these two exhibits hindered more than helped its case the government placed in evidence several advertisements and some promotional material. From

these items the government argued that the defendants shipped the film on the specific date alleged in the indictment. The government's argument must fail. The mere fact that the defendants advertised that they presented and released the film gives rise to no inference that they were the shipper on the day in question. The film could very well have been shipped by the theatre at which it last played or could have been shipped by an independent booking agent. If the only proof necessary was that at some time the defendants shipped the film then the advertisement might have some probative value. But the government is required to prove that the defendants shipped the film on a specific date and not that they shipped the film some time during its existence.

In the absence of any other proof as to who the shipper was the evidence has completely failed to connect either defendant in any way with the shipment or carriage of this film. The district court was in error in denying defendants motion for a judgment of acquittal at the end of the government's case and was also in error in denying the defendants' motion for a judgment of acquittal after the case had concluded.

CONCLUSION

The judgment of convictions should be reversed.

Respectfully submitted,

KASSNER & DETSKY, P.C.
Attorneys for Appellants.
122 East 42nd Street
New York, New York 10017

Seymour S. Detsky
of counsel

United States Court of Appeals
for the Second Circuit

United States of America,

Plaintiff-Appellee,

against

Nicholas Demetroules and NMD Film Distributing Co., Inc.,

Defendants-Appellants.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Jerry N. Simmons, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 25 Elliott Place, Bronx, New York

That on December 20, 1976, he served 2 copies of Brief and 1 Copy of Appendix on

Theodore Burns, Esq.,
Assistant U. S. Attorney,
United States Courthouse,
Buffalo, New York, 14202.

by depositing the same, properly enclosed in a securely-sealed, post-paid wrapper, in a Branch Post Office regularly maintained by the United States Government at 350 Canal Street, Borough of Manhattan, City of New York, addressed as above shown.

Jerry N. Simmons

Sworn to before me this
20th day of December, 1976.

John V. Bosco

JOHN V. BOSCO
Notary Public, State of New York
No. 31-[illegible]
Qualified in Nassau County
Commission Expires March 30, 1977